

No Means No and States Carry On

On Thursday afternoon, the Obama Administration released two new key pieces of health reform regulatory guidance, including a series of FAQs that even further clarify the Administration's preexisting position that if an employer creates some type of premium reimbursement arrangement to pay for health coverage, then that arrangement is subject to all federal health law market reform requirements, even if the reimbursement is for individual insurance coverage premiums.

The Administration's prior guidance explains that employer healthcare arrangements, such as HRAs and employer payment plans, are group health plans that typically consist of a promise by an employer to reimburse medical expenses up to a certain amount. Thursday's guidance clarifies that such arrangements are subject to the group market reform provisions of the Affordable Care Act, including the prohibition on annual limits under Public Health Service Act (PHS Act) section 2711 and the requirement to provide certain preventive services without cost sharing under PHS Act section 2713. The Administration's guidance further clarifies that such employer healthcare arrangements will not violate these market reform provisions when integrated with a group health plan that complies with such provisions. However, an employer healthcare arrangement cannot be integrated with individual market policies to satisfy the market reforms. Consequently, such an arrangement may be subject to penalties, including excise taxes under section 4980D of the Internal Revenue Code.

Some of the highlights of the FAQs include:

Q1: My employer offers employees cash to reimburse the purchase of an individual market policy. Does this arrangement comply with the market reforms?

No. If the employer uses an arrangement that provides cash reimbursement for the purchase of an individual market policy, the employer's payment arrangement is part of a plan, fund, or other arrangement established or maintained for the purpose of providing medical care to employees, without regard to whether the employer treats the money as pre-tax or post-tax to the employee.

Q2: My employer offers employees with high claims risk a choice between enrollment in its standard group health plan or cash. Does this comply with the market reforms?

No, in the Departments' view, cash-or-coverage arrangements offered only to employees with a high claims risk are not permissible benign discrimination.

Q3: A vendor markets a product to employers claiming that employers can cancel their group policies, set up a Code section 105 reimbursement plan that works with health insurance brokers or agents to help employees select individual insurance policies, and allow eligible employees to access the premium tax credits for Marketplace coverage. Is this permissible?

No. The Departments have been informed that some vendors are marketing such products. However, these arrangements are problematic for several reasons. First, the arrangements described in this Q3 are themselves group health plans and, therefore, employees participating in such arrangements are ineligible for premium tax credits (or cost-sharing reductions) for Marketplace coverage.